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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
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11 ANDREA GORDON, )  
12 Plaintiff, ) No. C08-3630 BZ  
13 v. ) **ORDER GRANTING IN PART AND**  
14 THE BAY AREA AIR QUALITY ) **DENYING IN PART DEFENDANT'S**  
15 MANAGEMENT DISTRICT, ) **MOTION FOR SUMMARY JUDGMENT**  
16 Defendants. )  
\_\_\_\_\_ )

17 Before the Court is defendant Bay Area Air Quality  
18 Management District's ("defendant") motion for summary  
19 judgment on all eight of plaintiff Andrea Gordon's  
20 ("plaintiff") claims.<sup>1</sup> Defendant's motion is **GRANTED IN PART**  
21 and **DENIED IN PART** for the following reasons.

22 ***Exhaustion of Remedies***

23 Plaintiff's Fair Employment and Housing Act claims fail  
24 because plaintiff did not obtain a right-to-sue letter from  
25 the Department of Fair Employment and Housing as required by  
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27 \_\_\_\_\_  
28 <sup>1</sup> The parties consented to my jurisdiction for all  
proceedings including entry of final judgment pursuant to 28  
U.S.C. § 636(c).

1 the FEHA. Martin v. Lockheed Missiles & Space Co., 29  
2 Cal.App.4th 1718, 1725 (1994). Summary judgment is  
3 appropriate where a plaintiff fails to exhaust administrative  
4 remedies. Miller v. United Airlines, Inc., 174 Cal.App.3d 878  
5 890 (1985). Though plaintiff received a right-to-sue letter  
6 from the EEOC, "[a] right to sue letter from the EEOC does not  
7 satisfy the exhaustion requirement with respect to claims  
8 under the FEHA." Chambers v. City of Berkeley, 2002 WL  
9 433606, \*4 (N.D.Cal. 2002). Defendant's motion for summary  
10 judgment on plaintiff's FEHA claims is therefore **GRANTED**.

11 In its moving papers, defendant argued that most of  
12 plaintiff's claims under Title VII fail because plaintiff did  
13 not exhaust her administrative remedies. "A person seeking  
14 relief under Title VII must first file a charge with the EEOC  
15 within 180 days of the alleged unlawful employment  
16 practice[.]" Surrell v. California Water Service Co., 518  
17 F.3d 1097, 1104 (9th Cir. 2008).<sup>2</sup> After filing the charge, a  
18 plaintiff may sue only if the EEOC issues a right-to-sue  
19 letter. Id. at 1105. In the absence of any "equitable  
20 consideration to the contrary," failure to attain a right-to-  
21 sue letter renders a suit properly subject to dismissal.  
22 Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 626  
23 (9th Cir. 1988). Defendant argued that plaintiff had not

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25 <sup>2</sup> At oral argument plaintiff's counsel stated his  
26 belief that a plaintiff has 300 days to file a complaint with  
27 the EEOC, which is correct but only if proceedings are  
28 initiated at the state level in a deferral jurisdiction such as  
California. Laquaglia v. Rio Hotel & Casino, Inc., 186 F.3d  
1172, 1174 (9th cir. 1999). Here, the relevant charge was  
filed with the EEOC, not the California Department of Fair  
Employment and Housing.

1 articulated any equitable considerations to excuse her failure  
2 to exhaust her administrative remedies. Therefore, the only  
3 actionable employment decisions are those that fall within the  
4 scope of the April 3, 2007 EEOC charge, for which plaintiff  
5 was issued a right-to-sue letter.

6 At oral argument, plaintiff claimed that the scope of her  
7 EEOC complaint and subsequent right-to-sue letter were broader  
8 than defendant claimed. See Sosa v. Hiraoka, 920 F.2d 1451,  
9 1456-1458 (9th Cir. 1990). Because this is a question of law,  
10 the Court read Sosa, which provides some support for  
11 plaintiff's position. Sosa requires that EEOC charges be  
12 construed liberally and defines the scope of the EEOC  
13 complaint to include all charges which would have been  
14 encompassed by any EEOC investigation, including adverse  
15 employment actions that occur after filing a charge. Id. at  
16 1456-57. Defendant inexplicably did not cite Sosa in its  
17 papers and has not had any opportunity to respond to it. In  
18 view of the disposition of the other arguments, time remains  
19 to consider the appropriate scope of plaintiff's Title VII  
20 claims. Defendant shall file a supplemental brief of up to  
21 five pages on this issue by **January 19, 2010**, specifically  
22 identifying which, if any, of plaintiff's post EEOC complaint  
23 claims are encompassed by her complaint dated February 14,  
24 2007. If a reply is necessary, the Court will request one.  
25 In the interim this portion of the motion for summary judgment  
26 is taken under submission.

#### 27 ***Title VII Claims***

28 The hiring of Abby Young as Principal Governmental

1 Planner occurred within 180 days of the EEOC complaint on  
2 February 14, 2007. Plaintiff contends that defendant  
3 discriminated against her on account of her race in selecting  
4 Abby Young. At oral argument, plaintiff also claimed that  
5 defendant chose Young in retaliation for an internal  
6 discrimination complaint that plaintiff lodged following the  
7 hiring of David Wiley, a white male, in June of 2006.

8 In order to establish a prima facie case of race  
9 discrimination under Title VII, plaintiff must present  
10 evidence "that gives rise to an inference of unlawful  
11 discrimination." Sischo-Nownejad v. Merced Community College,  
12 934 F.2d 1104, 1009 (9th Cir. 1991)(citations omitted).  
13 Plaintiff may use direct or circumstantial evidence of  
14 discrimination. See id. at 1110. The amount of evidence  
15 plaintiff must produce for the prima facie case is "very  
16 little." Id. at 1111. Plaintiffs commonly follow the model  
17 for presenting circumstantial evidence first established in  
18 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Using  
19 the McDonnell Douglas model, plaintiff would have to present  
20 evidence that: 1) she is a member of a protected class, 2) she  
21 was qualified for the position, 3) she was subject to an  
22 adverse employment action, and 4) similarly situated persons  
23 not in her protected class were treated more favorably. See  
24 Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th  
25 Cir. 2002). If plaintiff succeeds in producing evidence  
26 sufficient to raise an inference of discrimination, the burden  
27 of production shifts to the defendant to articulate a  
28 legitimate, nondiscriminatory reason for the employment

1 decision. See id. Once the defendant rebuts the inference of  
2 discrimination, the plaintiff must show that the articulated  
3 reason for the employment action is a pretext for  
4 discrimination. See id.

5 Here, plaintiff satisfied her initial burden under  
6 McDonnell Douglas. Plaintiff is a member of a protected  
7 class; she is African-American. At oral argument, defendant  
8 conceded that plaintiff was qualified for the position.  
9 Finally, plaintiff did not get the job for which she applied.  
10 Abby Young, a white woman and similarly situated person, got  
11 the job. The burden then shifted to defendant to articulate a  
12 legitimate, nondiscriminatory reason for hiring Young instead  
13 of plaintiff.

14 Defendant failed to carry its burden in the second stage  
15 of the McDonnell Douglas analysis. The only material evidence  
16 defendant submitted is two memoranda from Vintze to Broadbent  
17 recommending that Young be hired.<sup>3</sup> These documents simply  
18 reflect Vintze's conclusion that Young was the best choice for  
19 the job. They do not explain why she was chosen over Gordon.

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21 <sup>3</sup> The February 14, 2007 Memorandum is the hiring  
22 recommendation. Young apparently turned the job down unless  
23 she was offered more money. The March 1 Memorandum, which adds  
24 little to the earlier one, justifies a pay increase.  
25 Plaintiff's objection to these hiring Memoranda, on the grounds  
26 that they are not records of regularly conducted activity under  
27 F.R.C. 803(6), is **OVERRULED**. However, given the nature of  
28 these documents and the fact that they are produced in a vacuum  
and without any context, doubts as to their trustworthiness are  
sufficient so that the court gave them little weight; not  
enough weight to carry defendant's burden of production.  
Plaintiff's same objection to other documents sponsored by  
Christine Holmes is **OVERRULED** for similar reasons. The  
objection that those documents were not properly authenticated  
is **DENIED**.

1 The attributes of Young discussed in those memoranda do not  
2 appear to be significantly different than those of Gordon.  
3 More importantly, it is difficult to know how those attributes  
4 relate to the qualifications for the job, since defendant did  
5 not submit the position announcement which, according to its  
6 hiring procedures, lists the qualifications for the position.<sup>4</sup>  
7 Holmes Dec. ¶ 6, Ex. 1, 2. Nor did defendant provide Young's  
8 application or any of the other documents which the hiring  
9 procedures require. Significantly absent is any declaration  
10 or other testimony from Vintze explaining why Young was chosen  
11 over Gordon.

12 Defendant's claim that it has met its burden under stage  
13 two of McDonnell-Douglas is not supported by the cases on  
14 which it relies. For example, in Reeves v. Sanderson Plumbing  
15 Products, Inc., 530 U.S. 133 (2000), the Court relied on a  
16 fully developed record following testimony at trial from  
17 multiple witnesses, who provided several legitimate,  
18 nondiscriminatory reasons for the adverse employment decision.  
19 Id. at 143-44. I therefore find that defendant failed to  
20 articulate a legitimate, nondiscriminatory reason for hiring  
21 Abby Young, and defendant's motion as to Title VII  
22 discrimination is **DENIED**.

23 To establish a prima facie case of retaliation under  
24 Title VII, plaintiff must show "(1) she engaged in a protected  
25 activity, (2) she suffered an adverse employment action, and  
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27 <sup>4</sup> For example, the hiring memoranda cite Young's public  
28 speaking experience, but there is no evidence that such  
experience was a job requirement.

1 (3) there was a causal link between her activity and the  
2 employment decision." Stegall v. Citadel Broad. Co., 350 F.3d  
3 1061, 1065-66 (9th Cir. 2004) (internal citations omitted).  
4 Plaintiff engaged in protected activity in her August 9, 2006  
5 letter protesting being passed over for the Supervising  
6 Environmental Planner position. She suffered an adverse  
7 employment action when she was again passed over for promotion  
8 when defendant hired Abby Young.

9 While the briefing on causation is virtually non-  
10 existent, the Court has examined the record and has found two  
11 pieces of circumstantial evidence regarding causation. One is  
12 temporal. Plaintiff was passed over on the next job for which  
13 she applied, about 6 months after her complaint. See Stegall,  
14 supra at 1069; Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th  
15 Cir. 1987). There is also some evidence that blacks were  
16 underrepresented in defendant's workforce. Although the  
17 overall level of circumstantial evidence does not appear  
18 strong, given the fact that the employment discrimination case  
19 with respect to the hiring of Young has survived summary  
20 judgment, it seems appropriate to allow the retaliation claim,  
21 which turns largely on the same evidence, to also go to trial.

#### 22 ***Section 1981 Claims***

23 The defendant also moved for summary judgment on the  
24 grounds that plaintiff failed to plead and prove her Section  
25 1981 claims. As a preliminary matter, defendant argued that  
26 plaintiff had failed to allege treatment pursuant to an  
27 "official policy or custom" of defendant. There was no  
28 further argument or citation to authority on this issue. At

1 the summary judgment stage, the question is whether there is  
2 evidence in the record that plaintiff's treatment was pursuant  
3 to official policy of defendant. The undisputed facts  
4 disclose that each of the hiring decisions were made by  
5 defendant's management, including its Executive Officer, Jack  
6 Broadbent. However, Jett v. Dallas Independent School  
7 District, 491 U.S. 701, 737 (1989) and Lytle v. Carl, 382 F.3d  
8 978, 982 (9th Cir. 2004), teach that whether a person is the  
9 final policymaker for purposes of making employment decisions  
10 is a question of state law which must be resolved by the trial  
11 judge before the case is submitted to the jury. Moreover, a  
12 person may have a title such as superintendent of schools and  
13 not necessarily be the final policymaker. See Jett at p. 737.  
14 Accordingly, the Court gave both parties an opportunity to  
15 submit further evidence and briefing on this issue.

16 The defendant's Board of Directors is its governing body.  
17 Cal. Health & Safety C. §40220. Broadbent is the District's  
18 Executive Officer and its Air Pollution Control Officer  
19 (APCO). He is authorized to appoint District personnel and to  
20 develop and implement policy for the District. Section 40751;  
21 Racine Decl. Exh. 1. Significantly, the written record of  
22 each decision of which plaintiff complains consists of a  
23 hiring recommendation to Broadbent. There is no dispute that  
24 Broadbent acted on it and there is evidence that defendant's  
25 practice was for Broadbent to give final approval of hiring  
26 decisions. Whether Broadbent made the decisions, as plaintiff  
27 contends, or merely ratified them, as defendant contends, is a  
28 question to be resolved at trial. Based on the record before



1 me, I find that Mr. Broadbent is the final policymaker on such  
2 matters and there is sufficient evidence of his involvement in  
3 the hiring decisions of which plaintiff complains for her  
4 Section 1981 claims to go to the jury.<sup>5</sup>

5 This brings me to the question of whether the defendant  
6 is entitled to summary judgment that it did not violate  
7 Section 1981 by discriminating and retaliating against  
8 plaintiff. In the 9th Circuit, the burdens of production and  
9 persuasion on summary judgment on Section 1981 claims are the  
10 same as those for Title VII claims. For the reasons that  
11 defendant is not entitled to summary judgment on plaintiff's  
12 Title VII claim involving Ms. Young, it is not entitled to  
13 summary judgment on the Section 1981 claims. Moreover,  
14 defendant has employed the same methodology in meeting its  
15 burden of production at stage two of the McDonnell Douglas  
16 analysis with respect to all of the other claims asserted by  
17 plaintiff. For the reasons the District has failed to meet  
18 its burden with respect to Young, it has failed to meet its  
19 burden with respect to the other hiring decisions.

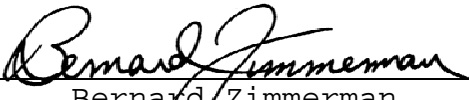
20 For the stated reasons, defendant's motion for summary  
21 judgment as to plaintiff's FEHA claims is **GRANTED**.  
22 Defendant's motion for summary judgment on plaintiff's 1981  
23 claims is **DENIED**. Defendant's motion for summary judgment on  
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25 <sup>5</sup> Gillette v. Delmore, 979 F.2d 1342, (9th Cir. 1992),  
26 on which defendant relies, is readily distinguishable. Unlike  
27 Fire Chief Hall, Broadbent is the final policymaker for hiring  
28 decisions. And unlike the City Manager, the final policymaker  
in Gillette who was charged with being aware that Gillette had  
been disciplined and not having countermanded it, here  
Broadbent affirmatively approved the hiring decisions.

1 plaintiff's Title VII claims for race discrimination and  
2 retaliation in selecting Young for Principal Governmental  
3 Planner is **DENIED**. The motion for summary judgment on the  
4 remaining Title VII claims is taken **UNDER SUBMISSION**.

5 Dated: January 12, 2010

6   
7 Bernard Zimmerman  
United States Magistrate Judge

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